# No. 15,091

# United States Court of Appeals

## For the Ninth Circuit

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PACIFIC-ATLANTIC STEAMSHIP COMPANY, a corporation,

*Appellant,*

vs.

EMMA HUTCHISON, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased,

*Appellee.*

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## APPELLANT'S PETITION FOR A REHEARING.

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*To the Honorable Albert Lee Stephens and Frederick G. Hamley, Active Circuit Judges; and the Honorable Chase A. Clark, Chief Judge, United States District Court, District of Idaho:*

### INTRODUCTION.

Appellant addresses this petition for rehearing to your Honors solely because Rule 23 provides that "all petitions for rehearing shall be addressed to and be determined by the court as constituted in the original hearing." This rule, literally read, *disenfranchises* seven active circuit judges of the United States Court of Appeals for the Ninth Circuit, the Court to which the appeal of appellant

was taken in accordance with the statutes enacted by the Congress. Article I, Section 8, U. S. Constitution, provides that the Congress shall have power to constitute Tribunals inferior to the Supreme Court. Article III, Section 1 of the Constitution provides that

> "The judicial power of the United States *shall* be vested in one supreme Court, and in such inferior *Courts* as the Congress may from time to time ordain and establish."

Section 2 of the same article provides that the judicial power shall extend to all cases, in law, arising under the laws of the United States. The Congress has provided that in the Ninth Judicial Circuit

> "there shall be * * * a *court of appeals,* which shall be a court of record, known as the United States Court of Appeals for the Circuit" and that said "*court of appeals* shall consist of *the circuit judges of the circuit in active service.*" (Title 28, U. S. C. § 43.)
>
> "The *courts of appeals* shall have jurisdiction of appeals from all final decisions of the District Court of the United States, . . ." (Title 28, U. S. C. § 1291).

The Congress has also provided as follows:

> "Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:
>
> '(1) From a district court of the United States to the court of appeals for the circuit embracing the district; . . .' " (Title 28, U. S. C. § 1294.)

Appellant, Pacific-Atlantic Steamship Co., duly filed its notice of appeal pursuant to which it appealed "to the

United States Court of Appeals, Ninth Circuit (T. R., pp. 97-98); and thereby invoked the appellate judicial power and jurisdiction of the United States Court of Appeals for the Ninth Circuit, said Court of Appeals consisting of the *nine* "circuit judges of the circuit in active service."

It is, therefore, respectfully contended that no rule promulgated by the Court may lawfully divest any of the circuit judges of the circuit in active service of any of their judicial powers as part and parcel of the United States Court of Appeals for the Ninth Circuit in respect of any matter or thing which comes within the appellate judicial power and jurisdiction of the United States Court of Appeals for the Ninth Circuit. The fact that "In each circuit the *court* may authorize the hearing and determination of cases and controversies by separate *divisions,* each consisting of three judges" does not justify the conclusion that at any time the United States Court of Appeals for the Ninth Circuit shall consist of three judges. A careful reading of all of § 46, Title 28, U. S. C., will, it is respectfully contended, lead to the conclusion that the words "a *court or division* of not more than three judges" in subdivision (c) were not intended by the Congress to mean that there shall or can be *three* separate United States Courts of Appeals for the Ninth Circuit, each such separate Court of Appeals consisting of three judges. The Congress no doubt could have constituted three separate and distinct United States Courts of Appeals within the Ninth Circuit. It did not do so and it must therefore be obvious that it did not intend to do so.

Whether a petition for a rehearing should or should not be granted, in any case within the judicial power and

appellate jurisdiction of the United States Court of Appeals for the Ninth Circuit, consisting of the nine active circuit judges, is vitally more important than a determination, *after* a rehearing has been granted, whether the case shall be reheard en banc, or by the same or another division of the Court.

Section 46, Title 28, U. S. C. does not say that the judicial power and jurisdiction of the circuit judges of the circuit in active service is restricted in the sense that they have no authority whatever to decide whether a rehearing should or should not be ordered. Whether or not a rehearing should be granted is certainly a controversy. This controversy has not been heard or determined.

In the case of *Western P. R. Corp. v. Western P. R. Co.*, 345 U. S. 247, 97 L. ed. 986, 73 S. Ct. 656, the Court stated that

> "it is essential to recognize that the question of whether a cause should be heard en banc is an issue which should be considered separate and apart from the question of whether there should be a rehearing by the division."

The Court also suggested that

> "in recognizing the full scope of § 46 (c), the full membership of the court will be mindful, of course, that the statute commits the en banc power to the majority of active circuit judges so that a majority always retains the power to revise the procedure and withdraw whatever responsibility may have been delegated to the division. And, recognizing the value of an efficient use of the en banc power, the court should adopt such means as will enable its full membership to determine whether the court's administration of

> the power is achieving the full purpose of the statute so that the court will better be able to change its en banc procedure, should it deem change advisable.''

Rule 23, read literally, prohibits the Honorable William Denman, Chief Active Circuit Judge, and the Honorable Active Circuit Judges William Healy, Walter L. Pope, Dal M. Lemmon, James Alger Fee, Richard H. Chambers and Stanley N. Barnes from having anything whatever to do or say about whether a rehearing should or should not be granted.

The hearing and determination of a petition for a rehearing is a judicial act clearly within the judicial power and jurisdiction of the United States Court of Appeals for the Ninth Circuit and said United States Court of Appeals consists not of two active circuit judges and one United States District judge but of all nine active circuit judges. Pursuant to a literal reading of Rule 23, the active circuit judges with the exception of Judges Stephens and Hamley are prohibited from having anything whatever to do or say about whether or not the case and its controversies shall be reheard at all, or whether or not, in the event the original panel or division grants a rehearing, the case should be heard en banc unless a majority of the panel or division as constituted in the original hearing give their permission to the other seven active circuit judges to participate. This participation is also limited by a literal reading of Rule 23, in the first instance, to the *single* point whether the case should be reheard en banc. Thus, the tail wags the dog.

Appellant respectfully contends that Rule 23, read literally, is in contravention of the provisions of the Constitu-

tion of the United States hereinabove referred to and of the statutes, aforesaid, enacted by the Congress; and of the true meaning and construction of Title 28, U. S. C. § 46, upon which it is purportedly predicated.

In *Western Pacific R. R. Corp. v. Western Pacific R. Co.*, 197 F. 2d 994, 1015, six of the active circuit judges enunciated the following rule:

> "A petition for rehearing in any such case, whatever its form or wording, must necessarily be treated as addressed to and is solely for disposition by the court or division to which the case was assigned for determination. If the court so constituted, or a majority of its members, denies the petition, that ends the matter so far as it concerns the court of appeals."

In further support of its contentions in respect of Rule 23, appellant cites the opinion of the Supreme Court of the United States in *Western P. R. Corp. v. Western P. R. Co.*, 345 U. S. 247, 97 L. ed. 986, 73 S. Ct. 656, the dissenting opinions of the Honorable James Alger Fee and Chief Judge William Denman in the same case when it was pending before the United States Court of Appeals, Ninth Circuit, said last mentioned opinions being found in Volume 197 F. 2d, pages 1012-1013 and 1016-1021; and subdivision 2 of Rule 4 which provides as follows:

> "The chief judge after conference with the circuit judges shall designate and assign the judges who are to hear the causes placed upon the calendars of the court; such designation or assignment may be *modified* or *set aside* by a majority of the judges."

A good and sufficient reason for having each one of the nine active circuit judges know something about this case

and controversy before the United States Court of Appeals for the Ninth Circuit loses its appellate jurisdiction in respect thereof by the lapse of time is clearly stated by the Honorable Mr. Justice Felix Frankfurter of the United States Supreme Court as follows:

> "To be sure, the non-sitting judges have not heard the argument nor read the briefs, and have no vote as far as the opinion of the panel is concerned. Presumably, however, an opinion *states* the issues and gives the *grounds* for its conclusion and thereby sufficiently alerts the minds of experienced judges to what is at stake. It taps their knowledge of the legal considerations that may lead, on the initiative of a non-sitting or of a sitting judge, to a determination by the entire court of whether or not a rehearing en banc is called for." (*Western P. R. Corp. v. Western P. R. Co.,* 345 U. S. 247, 271-272, 97 L. ed. 986, 1001.)

The opinion of the division or panel in the case and controversy at bar does not measure up to Mr. Justice Frankfurter's observation of what an opinion should be.

The opinion should be so composed as to readily alert the justices of the Supreme Court in respect of the legal issues raised by the specification of errors and the reasons underlying the decision from a mere reading of the opinion itself in the event they are called upon to consider the contentions of the appellant. There should not be any justification for a claim by the appellant on a petition for a writ of certiorari that its contentions have not been considered or decided. This panel or division should not leave the case in such condition that the Supreme Court will be compelled, in order to do its duty, to wade through

two appellate records and all of the briefs of appellant in order to find out whether justice has been administered.

The grounds of this petition are stated as follows:

Ground Number One: The panel or division has misstated some facts and also neglected to state other material facts as they appear in the Transcript of Record.

Rule 8 provides that

> "The practice [here] shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable."

Rule 1 (e) requires that the

> "Briefs of an appellant * * * shall contain * * * A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the printed record."

Appellant's "Statement of the Case" is in strict accord with that Rule and your Rule 18. No one can point to a single inaccurate statement of the oral, photographic or documentary evidence as the appellant has set it forth in writing in its Opening Brief. As one of its grounds for a rehearing, appellant contends that it was the duty of this panel or division to consider and decide the legal issues involved upon the evidence as it actually exists in the Transcript of Record and not otherwise. When the Rules require an appellant to be accurate, fair and complete in its statement of the evidence in its brief there is a clear duty on the part of the judges to also be accurate, fair and complete in their statement of the facts in the opinion. This has not been done.

Ground Number Two: The opinion is a clear departure from the accepted and usual course of judicial proceedings in that this panel or division has neglected or refused to consider and decide the legal issues presented in the briefs and oral argument of appellant's attorney in the same clear and distinct manner in which the United States Court of Appeals for the Ninth Circuit has considered and decided such questions in the vast majority of other cases and controversies which it has adjudicated. The panel neglected or refused to state the actual averments, or even their substance, of the count designated as the "Second Cause of Action"; nothing whatever is said in respect of the contention that the "Second Cause of Action" of the amended complaint was fatally defective in two respects: (1) The failure to aver that the appellant was a common carrier engaging in interstate or foreign commerce or that Hutchison died as a result of personal injuries suffered by him while he was employed by such carrier in such commerce or that he was "a member of the crew"; and thus the pleading failed to aver facts showing that "the pleader *is* entitled to relief" pursuant to the *statutory* right of action for death in which it is *expressly* stated that *all* statutes of the United States conferring or regulating the right of action for death in the case of railway employees *shall* be applicable. (2) That for the same reasons the United States District Court was not vested with jurisdiction in respect of said "Second Cause of Action."

Ground Number Three: The opinion of the panel or division is opaque, vague and ambiguous. It completely fails to state the substance of the evidence admitted over

the objections of appellant or of the objections or motions to strike the same. It completely fails to state the substance of the *given* instructions objected to, the substance of the objections thereto; or the requested instructions which were refused or the objections made to such refusals. In fact, the opinion fails to state or to distinctly rule upon a single contention of appellant in respect of the "Second Cause of Action," as set forth in its written briefs or oral argument, excepting *one* that is *moot* in the absence of a refusal to consider the objections to instructions given or refused upon the sole ground that F. R. C. P. Rule 51 was *not* complied with. The fact that said contention was immaterial, under *such* circumstances, was asserted in the Opening Brief at page 143. Your implication that appellant asserted only *one* contention in respect of jurisdiction; and that said point was exactly that referred to in the first opinion is *entirely* incorrect. No question of jurisdiction in respect of the "Second Cause of Action" was raised or passed upon in the first appeal.

The language of the opinion can be compressed into two sentences, as follows:

> "We do not *state* the substance or any part of the pleadings, say anything about the Federal Employers' Liability Act, the substance of the evidence introduced without objection or that introduced over objection, the substance of the objections, the substance of the instructions as given or refused or the objections thereto, the grounds of the motions for a directed verdict; or the specific contentions in respect of the questions raised in appellant's briefs and oral argument as to the jurisdiction of the trial Court or of

this Court on the first or second trial records. All of these contentions are *considered and decided* as follows: There is no merit in any of them."

Ground Number Four: The panel or division has included in its statement of the facts which it says "shows an abundance of evidence that warranted the submission of the case to the jury" the following:

> "The men who had been working with him concluded that he had gone ashore to take a day off, as sailors were in the habit of doing. He did not report for work the next day, April 25th. When on April 26th, he was again absent from duty, the chief mate telephoned the Baltimore police to inquire whether he was being held in custody. The police had no record of his being held. No other effort was made to ascertain his whereabouts. A search of the forecastle and the mess room was made but no general search of the ship was instituted because it was assumed that he had gone ashore. The Linfield Victory left Baltimore supposedly without him, arriving at Philadelphia on April 29th. On April 30th, six days after Hutchison's disappearance, his body was discovered by the chief electrician at the bottom of the ventilator shaft adjacent to the ladder leading to the tween decks area where the men had worked on April 24th."

It is impossible for any member of the Bench or Bar to determine from the language of the opinion what you are referring to as "an abundance of evidence." If you are referring to Crawford's statement that in the course of his experience he had seen "a screen, a heavy screen which excludes the danger" as a protective device other than a protective device such as the guard rails around

the ventilator shaft, which would exclude a dangerous area when there was an area of access immediately close to it or in the vicinity and that that screen would be located where the guard rails were (T. R., pp. 233-235), it is respectfully requested that the panel or division make that statement distinctly and directly so that the Justices of the Supreme Court of the United States, in the event this petition for rehearing is denied, will not have to search through the record to find out what evidence you have in mind. If by your language "abundance of evidence" you are referring to Amundsen's statement that "other ships got screens down here, and stuff like that," over the top of the ventilator shaft (T. R., p. 142), it is respectfully requested that you distinctly and directly so state. You should also state *when,* with reference to *April 24th, 1951,* either of these witnesses had seen what he claimed to have seen in the foregoing respects.

The attention of your Honors is particularly directed to the comment made by Judge Tolin on January 12, 1953, shown in the Reporter's Transcript of Proceedings, a part of the record of the first appeal in this Court, number 13,852, at page 726, as follows: "Your case, Mr. Simpson, was *not* a strong case *at the most.* It was a *very, very thin* case." (T. R., 1st Appeal, p. 726, lines 4-5.) It is difficult to understand how, in the face of *less* evidence having been introduced by the plaintiff at the second trial than she introduced during the first trial, the case has been so "*fattened* up" that the record now "shows an *abundance* of evidence that warranted the submission of the case to the jury." If your statement "an abundance of evidence" refers to the "search for and

discover'' theory of paragraph IX of the Complaint, and you intend to hold that evidence in the record with reference to a failure to search for and find Hutchison before he died is legally sufficient to have warranted the submission of the case to the jury and is legally sufficient upon *that* theory, to sustain the verdict of the jury on the Second Cause of Action, appellant respectfully requests and suggests that you say so distinctly and directly so that the Supreme Court of the United States will know the basis of your judgment affirming the judgment on the Second Cause of Action. The opinion in the foregoing respects is extremely vague, indistinct and uncertain.

Ground Number Five: The statement of the panel or division that ''the allegations of the complaint are in the customary language of the Jones Act'' is meaningless. There is no such thing as ''*customary* language of the Jones Act.'' The language of the Jones Act is explicit. The language actually contained within the four corners of Title 46 U. S. C. § 688, is, because of the adoption thereof by reference thereto, exactly the same as the language of the Federal Employers' Liability Act to which specific reference is made. There is nothing customary about that language. It is also explicit.

Ground Number Six: The ruling that all that is required in an action at law in pleading a cause of action for damages by reason of the death of a seaman is that the complaint allege that the deceased was employed as a seaman and that the vessel was plying navigable waters is in direct conflict with the provisions of the death action portion of the Jones Act and the statutes of the United States made a part thereof by reference thereto. The decisions,

in the cases of *McKie v. Diamond Marine Co.,* 204 F. 2d 132 and *Schantz v. American Dredging Co.,* 138 F. 2d 534, involved personal injuries and had nothing whatever to do with the sufficiency of a complaint premised upon that part of the Jones Act which provides that

> "in case of the death of any seaman as a result of any such personal injury [a personal injury suffered by a seaman in the course of his employment] the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable."

Ground Number Seven: Every statement of fact which you have made in the opinion, with reference to *conditions,* must have been intended to relate to the conditions at the *precise* time when Hutchison got into the ventilator shaft and fell to the bottom thereof. You say, therefore, in effect, that at the *precise* time of the fall "the ventilator shaft was *unlighted.*" The evidence shows without conflict that at about 8:00 A. M. on April 24, 1951, the door to masthouse number 2 was opened by Amundsen. There is no evidence that it was ever closed, thereafter, on that day at any time during working hours which terminated at 3:00 P. M. It is therefore presumed, in the absence of any evidence whatever to the contrary, that the condition with reference to the open door remained the same throughout the working hours. Thus, your statement that at the precise time Hutchison fell into the ventilator shaft, it was "unlighted" means that it was "pitch-dark"; and therefore the fall must have happened during

the *nighttime*. This utterly destroys any basis of a finding that Hutchison got into or fell into the ventilator shaft "in the course of his employment."

Ground Number Eight: No instruction whatever was given to the jury defining what is meant by the language "in the course of his employment." Appellant requested such instruction. It was refused. The jury was therefore left to its own unenlightened resources in determining whether Hutchison was or was not acting in the course of his employment at the precise time when he got into or fell into the ventilator shaft. You say nothing whatever about this omission in the instructions as given to the jury but it certainly is a very important element and legal issue involved on this appeal. This issue should be distinctly and directly ruled upon in the opinion.

Ground Number Nine: The opinion says absolutely nothing with reference to the contentions of the appellant that the comments made to the jury by the trial judge were unfair, one-sided and erroneous. For example, the trial judge commented upon the subject of contributory negligence as follows: "If, for instance, and this is just an illustration—I don't suggest to you it *is* true, *but you should consider whether it is,* and it is an illustration of that instruction—you believe from all the evidence that Mr. Hutchison was feeling rugged—whatever that means, but you have heard the testimony—and that he had a hangover, then you would consider whether or not a man, knowing that he felt rugged and having a hangover would go into *the* type of *act or acts* in which he *was* engaged at *the* time of the injury. That is, would he go about masthouses and *climb up and down ladders* or would he

take a sick leave? Was it ordinary prudence, was it reasonable care for him to do that?

"If you find that it was not or if you find there was some other contributory negligence—*at the moment as I sit here that is the only thing in the evidence which occurs to me,* but you will be guided by what occurs to you—that might be felt, upon a full analysis by a jury, to be contributory negligence, if you find there was, then if you have found primary negligence, that is negligence on the part of the defendant, you will then assign to the contributory negligence some percentage and diminish the recovery, which is allowed because of the extent to which the contributory negligence exists, if it did exist, and if primary negligence existed . . ." (T. R., p. 513.) Appellant objected to this comment "upon the ground that that is an instruction with reference to *fact* which *deprives* the defendant of a *right to a jury trial"* and also contended that "it is a *violation* of our *constitutional* right to a jury trial." (T. R., pp. 536-537.)

The opinion says absolutely *nothing* in respect of this important matter. It should be directly and distinctly ruled upon.

Ground Number Ten: The opinion is in conflict with that portion of Article VI, Clause 2, Constitution of the United States, which provides that

> "This Constitution and the Laws of the United States which shall be made in pursuance thereof; * * * shall be the supreme law of the land,"

in that you have ignored the language of the Jones Act and that of the Federal Employers' Liability Act incorporated therein by reference thereto, and have by judicial

legislation amended the statute by holding that all that is required in order to state facts sufficient to constitute a cause of action for damages by reason of the death of a seaman is that the complaint allege that the seaman was employed as a seaman and that the vessel was plying navigable waters. The words "a vessel plying navigable waters" are not in the statute.

Ground Number Eleven: The opinion is in direct conflict with that part of Amendment V, Constitution of the United States, which provides that

> "No person shall be deprived of property without due process of law"

and of that part of Amendment VII, Constitution of the United States, which provides that

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

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## ARGUMENT.

### (a) GROUND NUMBER ONE.

Perhaps, and appellant's attorney hopes it is not true, the "in camera" atmosphere of a vindication of the "esprit de corps" of the federal judiciary is responsible for the failure of the panel or division to perform its duty as has been the case in appeals involving other parties and attorneys. The opinion of a different panel, which included Judge Stephens, in the case of *Van Camp Sea Food Company v. Nordyke*, 140 F. 2d 902, is a classic and fair example of "the accepted and usual course of judicial proceedings" on all appeals adjudicated by the United

States Court of Appeals for the Ninth Circuit. Many more could be cited. In that case the judges *stated* the pleadings, the evidence, the instructions to the jury, the objections and contentions of the appellant and wrote a direct and forthright opinion, pursuant to which any ordinarily intelligent judge or attorney can clearly understand the legal issues involved and the decision of the panel or division in respect thereof.

In the case at bar, Judge Mathews, at the oral proceedings on appellant's motion to supplement and correct the Transcript of Record referred to the motion and affidavit of appellant's attorney as a "feud" with Judge Tolin. He also, according to my recollection, said: "*If* you will cease this feud with Judge Tolin, a good man, you will (or may) be able to do your client more good in this case than *otherwise.*" Judge Hamley was there, as one of the panel or division. If I have not stated the fact, I would like to have Judge Hamley so state in a supplement to the opinion, if this petition is denied. This is a court of record, but the clerk made no entry in the minutes showing that part of the proceedings. In spite of this implied threat, the personal integrity and impartiality of the trial judge were thereafter questioned in writing in the Appellant's Opening Brief.

Your Honors do not notice or attempt to distinguish the many authorities cited by appellant in support of its contentions as set forth in the briefs and oral argument. Why not? They are in point and support the contentions in respect of which they were cited. Vide: The cases and authorities dealing with the vital questions of artificial illumination and "in the course of the employment", for two examples.

The panel or division has adopted, as its statement of the facts in the record on appeal in the case at bar, an excerpt from the opinion of another panel or division of the court in the case of *Hutchison v. Pacific-Atlantic Steamship Co.*, 217 F. 2d 384, 385, wherein it is stated that "the men used an iron ladder adjacent to an *open* ventilator shaft." The unvarnished truth in respect of the ventilator shaft is that the iron ladder was not adjacent to the ventilator *shaft* and that the ventilator shaft was not an *open* shaft. The iron ladder was affixed to a steel plate which separated the *access* shaft, not mentioned in the opinion, from the ventilator shaft. The top of this steel plate is flush with the level of the masthouse deck. The *top* rung of the iron ladder is *below* the top of the steel plate. The ladder was affixed to the aft surface of the steel plate which made up the forward side of the access shaft and the rungs and side rails of this ladder were approximately six inches aft of said surface of said steel plate. Immediately above the top of said steel plate which separated the access shaft from the ventilator shaft there was a substantial and permanently affixed two-course pipe railing which extended from the port solid steel bulkhead of the masthouse to a stanchion located at the junction of said steel plate and the floor or deck of the masthouse and from that junction to the forward solid steel bulkhead of the masthouse. (Photographs and diagram, plaintiff's exhibits 1, 2, 3, 9, 10 and 12.)

These rails were described by *plaintiff's* witness Amundsen in the record on appeal in number 13,852 as "rails *guarding* the ventilator shaft" and "*bars* guarding the ventilator shaft". (*Hutchison v. Pacific-Atlantic Steam-*

*ship Co.,* No. 13,852, Vol. 1, pp. 83-84.) The same evidence is in the record on appeal in number 15,091, *Pacific-Atlantic Steamship Co. v. Hutchison.* (T.R., pp. 155-156.) Plaintiff's witness Crawford testified at the last trial that the rails were "guard rails" and were "protective devices". (T. R., pp. 233, 235.)

In the opening brief for the appellant in the case of *Hutchison v. Pacific-Atlantic Steamship Co.,* No. 13,852, at p. 4, lines 12-13, her attorney said, with respect to these railings, as follows: "*Surrounding* the top of the ventilator trunk there were *two pipe railings.*" Thus, a truthful statement of the fact is that there were *protective* devices consisting of guard rails surrounding the two sides of the ventilator shaft, and steel bulkheads on the other sides.

A "guard rail" is defined in Funk & Wagnalls Standard Dictionary, Medallion Edition, at p. 1086, as "a safety-rail around a hatchway or similar place." In Webster's New International Dictionary, Second Edition, p. 1111, the noun "guard", in its nautical connotation, is defined as "a fence or rail to prevent falling from the deck of a vessel"; and on the same page "guard rail" is defined as: "a railing to guard against accident or trespass" and "to protect with a guard rail."

An *open* ventilator shaft is one which is not protected or barricaded by a fence or guard rail; so that there is nothing to impede free and unobstructed ingress or egress. (Please see Dictionary definitions.)

Your Honors also adopt and therefore make the *unqualified* statement that "the ventilator shaft was *unlighted.*" This is a representation by your Honors, in

the faithful and impartial performance of your respective offices as active circuit judges and a pro tempore circuit judge, that there is in the record some testimony or documentary evidence which will support an inference that, at the *precise* time when Hutchison got into the ventilator shaft, the masthouse was in a state of darkness. There is no evidence of any kind in the record to support this statement. It would be easy, if it existed, to quote the testimony or documentary evidence or to state its substance. Your Honors can not do this.

Your Honors also state as follows:

> "A second trial was had before the Court and jury on the same set of facts together with some additional facts not covered in the above statement, but which do not change the case materially."

Your Honors thus, upon your oaths to faithfully and impartially discharge the duties of your respective offices, agreeably to the Constitution and the laws of the United States, represent to the Bench and Bar, and to the Supreme Court of the United States, in the event it is called upon to determine whether it should or should not grant a petition for a writ of certiorari, as it will be, in the event this petition for a rehearing is denied, that, with the exception of some utterly immaterial additional facts, the first and second trials of this action, on the *second* cause of action, were had before the Court and the two juries "on the same set of facts" copied from the opinion on the first appeal of this case. This is not the fact.

There was no issue or contention raised by the plaintiff during the first trial of this case, in respect of the

*second* cause of action, that she was "attempting to recover under the cause of action for death on the theory that the death of Nathanael Patrick Hutchison was proximately caused not by the injury he received but by a failure to properly treat him between the time of receiving the injury and the time of the death" because, as stated by the Court, "Counsel *disavowed* that in the pretrial." (T. R., 1st Appeal, No. 13,852, p. 414.) Upon the same subject, the record on the first appeal also shows as follows:

"Q. By Mr. Simpson. On the basis of the same facts as stated in the hypothetical question, Doctor, do you have an opinion as to whether surgery could have saved the life of Nathanael Hutchison?

Mr. Gallagher. That is objected to on each and every ground heretofore stated since this witness has been on the witness stand, and particularly, on the ground it calls for surmise and conjecture without one single substantive fact to back up any such hypothesis.

The Court. I will overrule the objection, and place a Court's objection and sustain my own objection *in that there is no issue here on that, because counsel disavowed any cause of action at the pre-trial based upon neglect of the injured man.*

Mr. Simpson. That statement by your Honor is, of course, *completely correct,* excepting the part of the *first cause of action* with respect to the fact that had a search been conducted and the man found at the time, his life might be saved, and that this failure to conduct such a search actually constituted neglect on the part of the defendant becomes significant in the light of the fact, if he could have been saved.

Mr. Gallagher. There are no allegations.

The Court. If there is a difference between what you *now* urge and what you *disavowed* I cannot see it.

Mr. Gallagher. Furthermore, if your Honor please, there are no allegations upon which a claim predicated upon the vicarious responsibility of an employer can be asserted in this case. I gave your Honor 42 Federal Second yesterday on that very point. You have to plead the negligence of the servant who is supposed to have caused or proximately contributed to the death.

The Court. *Sustained.*

Mr. Simpson. Your Honor, in connection with this point and not to belabor it because we have taken a great deal of time on these points, if I disavowed, as Your Honor says, something which included the very thing we have taken into consideration that was no intention of mine because I did not interpret it to go that far. I consider it a very important part of the case in connection with the issue before the Court; also, the second cause of action—

Mr. Gallagher. If counsel wants to amend his complaint to charge everybody on the boat with negligence I have no objection at all but I want time to get the evidence. He can have three months.

Mr. Simpson. The complaint does charge the defendant in being neglectful in that manner which embodies, naturally, that the defendant being a corporation can only act through its servants.

The Court. At the time of the pre-trial I think I stated to you I understood your case had two causes of action; one, for personal injury suffered by Nathanael Hutchison during his lifetime, and those injuries were enumerated; that is, not having a safe place to work he fell and sustained a skull fracture and so on. You left it there.

Then you had a second cause of action that Mrs. Hutchison, the widow had suffered the loss of her husband which she said deprived her of support and the expectation of support over the course of his life expectancy. Then I asked you, because I could not see what you are now urging as included in that, I asked you: *are you contending that this man lay injured at the bottom of the shaft and that there was neglect in getting him out under the circumstances where his life could have been saved if it had not been for some neglect of the employer and I understood you to say no.*

Mr. Simpson. Your Honor, with respect to the first cause of action I think that would be correct as to the allegation of conscious pain and suffering. As to the second, we have to show there is neglect in order to establish the widow is entitled to pecuniary loss and if there was negligent action which resulted in the death—or, putting it another way, if his life could have been saved there would have been no pecuniary loss.

The Court. Then I think you would have a *third* cause of action, or an expanded pleading on one of the others and you just don't have it. It is *not* included.

*The objection will remain sustained.*'' (T. R., 1st Appeal, No. 13,852, p. 565, line 15 to p. 568, line 17.)

Testimony which was in the record on appeal on the first appeal and which is not in the record on appeal on the second appeal, is as follows:

(1) ''Q. Looking at the exhibits which you have identified and which have been marked as Amundsen A and Amundsen B I'll ask you if the arrangement of guard rails appears to be the same or different than those on

other ships that you have served on? A. These are *wrong* here." (Testimony of Amundsen, 1st Record on Appeal, No. 13,852, p. 64, line 24 to p. 65, line 4.)

(2) At the first trial, Kent Castle, Jr., testified in person as a witness in open Court. (T. R., 1st Appeal, No. 13,852, pp. 85-107; 218-225.) The only testimony of the witness Castle in the record on the second appeal consists of a portion of the deposition of said witness taken September 20, 1952. (T. R., 2nd Appeal, No. 15,091, pp. 217-223.) The testimony which he gave in person at the first trial and that which was read from his deposition at the second trial is not similar in substance or effect. The testimony given in person at the first trial consisted mainly of statements with reference to alleged *customs and practices* and opinions with reference to safe and unsafe *practices*. None of this is set forth in Castle's deposition as read to the jury in the last trial.

(3) "Q. By Mr. Simpson: Were there any lights in this masthouse? A. I believe there was a built-in light but I don't know if it works or not, because nobody ever uses it anyway. Q. Have you observed ever the built-in light you have menioned put on in the masthouse? A. All them lockers have lights and a switch. Q. Have you ever observed whether it was on or off in that masthouse? A. I didn't observe whether it was on or off. The individual himself turns it on if he is in there and wants to use it. And if he don't he don't turn it on. And he turns it off when he goes out of there. (T. R., 1st Appeal, No. 13,852, p. 239, line 13 to p. 240, line 2.) Q. Where is this cluster light that you referred to in your direct examination, Mr. Kalnin? A. There it is, right there. Q. Is it a light that

illuminates the shaft where the ladder is in the masthouse? A. This cluster light isn't the *regular* light. The *regular* light is overhead some place. This is just a hang-in light that you switch in any place. See the rope tying it, holding it up? Q. But there is a light up above the shaft with the ladder in the masthouse? A. Yes, right in the overhead somewhere. Supposed to be in here somewhere. Haven't got the whole thing. Light in there somewhere—switch and everything. Q. When you say 'Light in there somewhere, and a switch,' you are referring to the masthouse where men would go in to climb down that ladder which is in the *shaft* immediately adjacent to the ventilator shaft? A. The light is *overhead*. Q. I am trying to locate the place where you are talking about when you say there's a light there and switch. You are referring to the particular part of the masthouse which encloses these two shafts, in one of which there was a ladder? A. That's right. But the light doesn't go direct into that shaft; just gives you enough so you can see. Q. And that's a light that can be turned on or off by a man in the event he needs to use it? A. That's right. Q. That is an electric light? A. Yes. Switch right by the door. (T. R., 1st Appeal, No. 13,852, p. 258, line 1 to p. 259, line 9.) Q. When a search is conducted, what parts of the ship does it cover? A. It should cover all of it, but it is not my job to be searching for anybody. If they are not in the mess room or their room *when it is time to go to work*, I don't worry about it—just tell the mate to get another sailor and let it go at that. (T. R., 1st Appeal, No. 13,852, p. 260, lines 10-16.) Q. With respect to the light that you have observed—or that you testified to with respect to Mr. Gallagher's question, in trying to locate it in the

photographs, you said that there should be a light there. Mr. Gallagher: Some place. Mr. Simpson: Pardon? Mr. Gallagher: Some place. Mr. Simpson: Yes, some place in the masthouse. Mr. Gallagher: And if you are repeating his testimony, he said, 'This picture doesn't show the entire upper surface of the masthouse,' or words to that effect. Mr. Simpson: The question is: Q. Did you ever see a light in that masthouse? A. No, I never seen it because I never used the light myself. I just know where it is at. Q. What facts do you base that upon, when you say you just know where it is? Mr. Gallagher: Object to that on the ground it is cross examination of your own witness. Mr. Simpson: No. I want information as to what he bases it upon, since he has testified already that he has never seen it in this particular masthouse. A. I know the ship so well I just didn't have to use lights. If I want something or want to go down, I just know where everything is at without bothering to look for a switch or anything. Q. In your experience, had you ever seen lights on other Victory ships there? * * * The Witness: Lights on all; they are all built the same." (T. R. 1st Appeal, No. 13,852, p. 262, line 4 to p. 263, line 15.) *None* of the foregoing testimony of Kalnin, as read from his deposition to the jury in the first trial, was admitted in evidence or read to the jury in the second trial or can be found anywhere in the Reporter's Transcript or printed Transcript of Record on the second appeal.

(4) None of the voluminous testimony given by plaintiff's witness Robert Franklin Rife, (T. R., 1st Appeal, No. 13,852, pp. 264 to p. 371, line 10), is in the present record on appeal and none of it was introduced in evi-

dence in the last trial which resulted in the judgment from which the appeal has been taken.

(5) The witness Lorcan F. Crawford, appeared in person and testified as a witness on behalf of the plaintiff, in both trials. In the first trial he gave much testimony with reference to a claimed difference between the vertical iron ladder in the access shaft located in masthouse number 2 as compared with vertical iron ladders in access shafts on other and different ships. This testimony is shown in the following places in the Transcript of Record, 1st Appeal, No. 13,852: Page 493, lines 4-7; p. 503, lines 11-16; p. 504, lines 7-11; p. 506, lines 2-14; p. 510, line 19 to p. 514, line 20. He also testified, at the first trial, with respect to having seen on one ship, the steamer Queen, in 1915, "heaving lines rigged across openings to ventilator shafts." (T. R., 1st Appeal, No. 13,852, p. 520, lines 4-16.) *None* of the foregoing testimony given by Captain Crawford during the first trial is in the record of the second trial.

The "*immaterial*" (!) additional facts not covered in the excerpt from the first opinion, include the following: (1) Amundsen and Kalnin testified that the men were working, at different times in the morning, in *different* holds of the ship. Amundsen stated that at eight o'clock in the morning he, Hutchison and some other men descended to the *bottom* number *two* hold. This was the hold immediately forward of hold number three. Kalnin testified that some of the men were working in the *shelter* deck of hold number *three*. The shelter deck is only one deck below the main deck. The deck referred to by

Amundsen was the bottom deck of a different hold. (2) Kalnin's testimony that during the four months that he was aboard the Linfield Victory the ladder in the access shaft was used by seamen and longshoremen on many, many occasions. (3) Amundsen's testimony that on the particular date in question, April 24, 1951, the particular ladder was used by Hutchison on at least three occasions without incident or accident; and by *all* of the other men working with Amundsen on more occasions than three without incident or accident; and that he, Amundsen, *saw* Hutchison walk *up the ladder* on his way to the lavatory to get a drink. (4) John Hutchison's testimony that with the door of the masthouse open or even partly opened it was easy to see everything within the masthouse as soon as one's eyes became accustomed to the difference between the bright sunlight outside and the degree of visibility inside. (5) Castle's testimony that he made an examination of the masthouse and the area surrounding it [without any artificial illumination of any kind being mentioned]; and went *up and down* the ladder *several* times and looked *down* the trunk and looked about the interior of the masthouse; and his opinion *"that with* proper illumination or with *the doors wide open so that daylight could get in, it would be safe enough to work in the area mentioned, in the area of the masthouse"*. (6) The shipping articles which demonstrate, not having been signed by Nathanael Hutchison, that he was not a member of the crew on the intercoastal voyage. (7) The bareboat charter showing that the vessel was owned by the United States of America, and that the defendant was prohibited by the provisions of that contract from mak-

ing any structural changes or any changes in the appliances of the ship without the antecedent written permission of the United States of America. (8) The *verified* certificate of inspection showing that in the opinion of the duly authorized officer of the Coast Guard the vessel was in a condition to warrant belief that she could be used in navigation as a steamer, with safety to life; that all the requirements of law had been faithfully complied with and that the Coast Guard had *approved* the vessel and her *equipment* throughout. (9) Captain Dyer's testimony that the defendant had handled for the United States Government 36 or 37 Victory type vessels, 6 purchased outright by the defendant and 5 or 6 under bareboat charter; that he went aboard those ships, visited them frequently, and was present quite frequently while Coast Guard inspectors were inspecting Victory ships; that in the course of the inspections made by the Coast Guard inspectors, their inspection includes the entire vessel, all cargo spaces and masthouses; that in all of the Victory ships he had ever seen, he had not seen any which were any different from the number 2 masthouse as shown in the photographs taken of the "Linfield Victory". (10) Captain Dyer's testimony that there were 22 cargo lights on hand on the vessel on March 9, 1951, and that the licensed officers ordered an additional 4 which were delivered to the vessel before the commencement of the voyage and that in the event it is dark any place in the hold or in a masthouse a cargo light may be used for the purpose of supplying artificial illumination, which is their purpose; and that it is the right of any member of the crew to take such a light and use it

in case he desires to do so, the company having no restrictions on the use of the lights by the crew. (11) The testimony of Crawford, Dyer and Webb showing that the ventilator cowl was a hollow tube and that its smallest diameter was 36 inches without any obstruction to the passage of the luminous energy of light, excepting the screen over the outer opening and the screen across the lower opening. (12) The testimony of Wise and Webb as to adequate visibility with hatch number three *completely* covered, which was *not* the condition existing on April 24, 1951 when the aft section of hatch number three was *open*. (13) Dyer's testimony as to visibility *inside* the masthouse when the aft section of hatch number three *was* open.

All of this substantial and material evidence is set forth in "The Statement of The Case," with accuracy and proper references to the pages in the Transcript of Record, in appellant's Opening Brief, pp. 7-45.

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(b) GROUND NUMBER TWO.

When the Supreme Court of the United States is considering and deciding a legal issue involving the sufficiency of a complaint to state facts sufficient to constitute a cause of action under a federal statute, it takes the time to set forth the actual allegations of the complaint or at least a clear statement of the substance thereof and then proceeds to show that the complaint is or is not legally sufficient. Examples of this accepted and usual course of judicial proceedings in respect of such matters are the following cases: *Brown v. Western Ry. of Alabama,*

338 U. S. 294, 100 L. ed. 100; *Wilkerson v. McCarthy,* 336 U. S. 53, 93 L. ed. 497; and *Anderson v. Atchison T. & S. Fe Ry. Co.,* 333 U. S. 821, 92 L. ed. 1108. A good example of how the Ninth Circuit has considered and decided contentions in respect of the sufficiency of a pleading, is the accepted and usual course of judicial proceedings in said Circuit, is found in the case of *Lahde v. Soc. Armadora Del Norte,* 220 F. 2d 357.

Appellant therefore contends that there has been an unreasonable and unjustified discrimination against it in the neglect or refusal of this panel or division to consider and decide the legal issues clearly raised in the opening brief, reply brief and oral argument of appellant in respect of the insufficiency of the allegations of the "Second Cause of Action" in connection with the required *jurisdictional* averments and with respect to the averments which are required in order to state facts sufficient to constitute a cause of action under the death action portion of the Jones Act and the statutes of the United States as found in the Federal Employers' Liability Act, adopted by reference thereto as an integral part of said portion of the Jones Act. This discrimination is in contravention of the due process of law provision of Amendment V, U. S. Constitution.

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(c) GROUND NUMBER THREE.

All appellant can do at this point is to refer your Honors to the specification of errors as set forth in appellant's opening brief in respect of the subject matters of this ground of the petition; and the argument and au-

thorities in support thereof. By reference thereto, there is incorporated herein, all of said specifications of error and the argument and authorities in support thereof as set forth clearly in the briefs of appellant.

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(d) GROUND NUMBER FOUR.

Your Honors have treated the "search for and discover" allegations of paragraph IX and the evidence in respect of that subject in a vague, indistinct and uncertain manner. Appellant again calls to your particular attention the fact that there is no allegation whatever, anywhere in the amended complaint, that the master of the vessel had the slightest knowledge, actual or constructive, in respect of the fact that Hutchison had suffered any injury or that he needed any kind of medical or hospital care or attention. If, which appellant has always disputed, this theory of liability is one within the factual bases of possible liability as set forth in Title 45 U. S. C. § 51, it would have to be based upon the particular part of the said statute which provides that the employer is liable

> "in the case of the death of such employee, to his or her personal representative, . . . for such . . . death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

There is no averment anywhere in the amended complaint that the master of the vessel, or any other licensed officer of the vessel, negligently failed to provide necessary or

reasonably required medical or hospital care or attention or that as a proximate result of any such negligent failure Hutchison died or that the death of Hutchison resulted in whole or in part from any such alleged negligence. The law in respect of the proposition that the *master* of the vessel is *the* agent of the owner or employer for the purpose of providing whatever medical or hospital care is necessary in and about the treatment of an injury which is actually sustained in the service of the ship is thoroughly settled and discussed in the following cases: *The Iroquois,* 94 U. S. 240, 48 L. ed. 955; *The Troop,* 118 F. 769, 128 F. 856; *The C. S. Holmes,* 220 F. 273 and *Willey v. Alaska Packers' Assn.,* 18 F. 2d 8. No such issue was asserted in the amended complaint or mentioned in the evidence.

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**(e) GROUND NUMBER FIVE.**

It is respectfully contended that *custom* has absolutely nothing to do with whether a complaint does or does not state facts sufficient to constitute a statutory cause of action. The sole basis upon which the sufficiency of such complaint can be logically determined is to lay the provisions of the statute on one side and the averments of the complaint on the other and determine from a comparison thereof whether the complaint contains all of the averments which are set forth as the conditions precedent to a right on the part of the plaintiff to recover damages pursuant to the provisions of such statute. The amended complaint, in respect of the Second Cause of Action, does not meet this test. Please compare it, word for word, with § 51, Title 45, U. S. C.

Appellant's contentions with respect to this subject matter have not been considered or decided; and the authorities in support of appellant's contention, including the actual language of the statute involved, have been ignored. Your Honors do not mention the Federal Employers' Liability Act or any of the decisions in respect of the sufficiency of a pleading thereunder. This particular point is particularly worthy of a distinct and direct discussion because there is no adjudicated case, in so far as appellant's attorney is aware, wherein the contentions of the appellant, *in the case at bar,* in respect of the requirements of pleading a cause of action for the death of a seaman have been considered or decided.

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(f) GROUND NUMBER SIX.

The statement of this ground, supra, is all that is required at this point in view of the fact that the subject matter has been sufficiently brought to the attention of the Court hereinabove.

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(g) GROUND NUMBER SEVEN.

In view of the proposition that appellant cited quite a few decisions and authorities holding that artificial illumination is entirely unnecessary in the absence of proof that the place of work or a passageway used in getting to or from a place of work was dark at the precise time of the happening of an accident; or that at least the evidence must show that there was such a lack of the lumi-

nous energy of natural light as to make artificial light reasonably necessary, it seems sufficient to merely call your Honors' attention to said authorities at this point. All of them have been cited either in the opening brief, the reply brief or in the printed excerpts from appellant's oral argument. They are as follows: *Smith v. Arcadia Over Seas Freighters,* 202 F. 2d 141; *Lahde v. Soc. Armadora Del Norte,* 220 F. 2d 357; *Crawford v. Pope & Talbot, Inc.,* 206 F. 2d 784; 56 C. J. S., pp. 931-933; § 219 (b) (c).

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**(h) GROUND NUMBER EIGHT.**

Procedural due process of law as guaranteed to every person by the provisions of Amendment 5, Constitution of the United States, entitled the appellant to an appropriate instruction in respect of every genuine issue of material fact submitted to the jury.

> "Trial by jury as guaranteed by the Constitution of the United States and by the several States presupposes a jury under proper guidance of a disinterested and competent trial judge. *Herron v. Southern P. Co.,* 283 U. S. 91, 75 L. ed. 857, 51 S. Ct. 383." (Concurring opinion of Mr. Justice Frankfurter, in the case of *Wilkerson v. McCarthy,* 336 U. S. 53, 64, 93 L. ed. 497, 506.)
>
> "The aim of the Amendment, [Amendment V. U. S. Constitution] as this Court has held, is to preserve the *substance* of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to

be resolved by the court and issues of fact are to be determined by the jury under *appropriate instructions* by the court." (*Baltimore & Carolina Line, Inc., Petitioner v. Donald Redman,* 295 U. S. 654, 657, 79 L. ed. 1636, 1638.)

Pursuant to the foregoing clear enunciation of the Supreme Court of the United States, the appellant was absolutely entitled to have the jury instructed in respect of the meaning of the language "in the course of his employment" and also in respect of the subject matter of foreseeability. What the trial court stated to the jury with reference to the subject of foreseeability was not couched in language which would tell a jury of laymen anything about the real substance of this essential element of actionable negligence. What the court said about "reasonably apprehended" is not the same as telling the jury, in plain English, that no person is guilty of negligence because of a failure to take some affirmative act for the prevention of a possible accident unless in the exercise of ordinary care a person situated similarly to the position of the defendant would have anticipated, in the exercise of ordinary care, that a failure to take some step or to provide some additional safeguard would in all probability result in some kind of accident to some person required to be in the vicinity of the particular place involved.

For the failure of the trial judge to give instructions on these two subjects, the judgment should be reversed.

Grounds Number Nine, Number Ten and Number 11 sufficiently state the position and contention of the appellant for the purposes of this petition.

The authorities upon which the appellant relies in support of this petition are the same ones which were cited in its opening brief, closing brief and the printed excerpts from the oral argument.

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**CONCLUSION.**

It is respectfully submitted that this petition for a rehearing should be granted.

Dated, April 26, 1957.

LASHER B. GALLAGHER,
*Attorney for Appellant*
*and Petitioner.*

I hereby certify that in my judgment the petition for a rehearing is well founded and that it is not interposed for delay.

Dated, April 26, 1957.

LASHER B. GALLAGHER,
*Attorney for Appellant*
*and Petitioner.*